No. 98-1167

Supreme Court, U.S.
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In The
Supreme Court of the United States

EDWARD CHRISTENSEN, et al.,
Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

MICHAEL T. LEIBIG*
KIMBERLY A. SIMON
Zwerdling, Paul, Leibig,
Kahn, Thompson & Wolly
4102 Williamsburg Court
Fairfax, Virginia 22032
(703) 934-2675

RICHARD H. COBB
811 North Loop West
Houston, Texas 77008

MURRAY E. MALAKOFF
Alvarez & Notzen, LLP
5219 McPherson, Suite 380
Laredo, Texas 78041

*Counsel of Record — *Counsel for Petitioners*

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Introduction

Absent a mutual agreement, may an employer order employees to burn off accrued compensatory time under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA")?[1/]

[1/] The *amicus curiae* Spokane Valley Fire District No. 1 claims without foundation that Harris County had an agreement, within the terms of the FLSA, including a specific policy permitting the County to direct the use of compensatory time. No such agreement exists; nor has one ever existed. No such agreement is reflected in the stipulated facts. The question on which the Court granted *certiorari* is premised on the absence of such an agreement. Harris County did not contend in their brief in opposition to the petition for a writ that there was such an agreement. They, therefore, waived any such claim under Supreme Court Rule 15: "Any objection to consideration of the question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." In any event, the Harris County continues to make no such claim in the Brief. They make no such claim because there exists no such agreement. Whatever the facts might have been in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999) *petition for cert. pending* (October 5, 1999), where a collective bargaining agreement was in place, the Petitioners here have no such "compelled use of compensatory time" agreement with Harris County or its Sheriff's Office. The general "compensatory time agreement" found to exist between the deputies and the Sheriff's Office as a result of *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), was based on the fact that each Harris County Deputy has signed a brief, boiler plate payroll compensation form that said that the Deputy understood and accepted the County's personnel regulations. No Harris County personnel regulation contains a compelled use of compensatory time provision. *See* Pet. Br. at n. 12. Harris County Personnel Regulation 8.02 was the only related regulation when this case was litigated below and for the entire 1992-1995 pre-litigation/litigation period covered by the applicable statute of limitations. While it is not set forth in the Stipulated Record, it is a formal enactment of the Commissioners' Court of Harris County, Texas, of May 14, 1998, and reference to it as Harris County administrative law is appropriate. Harris County claims in their Brief at n. 2 that Personnel Regulation 8.02 is "not the regulation currently in effect" without citation

Senator Hugo Black condemned the company scrip paid as wages to the depression era Alabama mine workers he represented -- hard earned wages paid in tender redeemable solely in company owned stores. "The employers dish out company scrip from one vest pocket; their employees cycle it back into their other pocket." The future Justice argued, "It is self evident that this approaches not being paid at all." Senator Black led the New Deal effort to ban the use of such scrip in favor of mandatory cash overtime in the 1938 Fair Labor Standards Act. Today, it is equally self evident that wages paid in future time off, which the employer then orders burnt off on the employer's schedule and at the employer's convenience, is not the equivalent of premium overtime pay. It too, approaches not being paid at all. Accordingly, the Department of Labor's considered judgment is that the Fair Labor Standards Act public sector compensatory time provisions, 29 U.S.C. §§ 207(o) and 29 C.F.R. §§ 553.20-28, provide that, absent a willing, freely accepted agreement, which is consistent with the requirements of the Act and the regulations, and which is

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to any revisions or changes. In fact, the current Harris County Personnel Regulation 3.01-3.0234 effective July 1, 1999 continues to authorize payment in compensatory time but without a provision which authorizes employer compelled use of accrued compensatory time. No where in the relevant regulation is there any mention of compelled use or other express provision on the "preservation, use and cashing out" of compensatory time. The Rule does contain provisions that compensatory time is "carried forward indefinitely," "may be used at any time approved by the employee's supervisor" and deference to "applicable federal and state statutes, rules and regulations." There is nothing in the Stipulation below which establishes that the Supervisors' orders to burn off compensatory time are the result of an agreement between the parties or a provision of a Harris County personnel regulation.

arrived at without coercion, an employer may not compel the use of accrued compensatory time. *See, detailed commentary* in Kearns (ed.), *The Fair Labor Standards Act* (ABA Labor and Employment Law Section, BNA Books, 1999) at 33-34 and 659-668, particularly, "There are no limitations on an employer's ability to cash out accrued comp time at the employee's regular rate at the time of payment, **but employers cannot force employees to use their comp time.**" *Kearns* at 666. The beneficial use of accumulated compensatory time is an employee's right. H. Rep. 99-331, App. G at 68a.[2/] The Congressional sponsors of §207(o) wrote:

> Once these limits are reached [the statutory maximum of 480 hours for public safety compensatory time accruals] an employee must be paid in cash for additional hours of overtime or else must use some compensatory time before any additional overtime hours may be compensated in the form of compensatory time.
>
> H. Rep. 99-331, App. G at 65a.

Congress makes no endorsement of employer compelled use of accrued compensatory time in the Act or in its legislative history. Accrued FLSA compensatory time banks may be reduced only in one of four ways:

[2/] The legislative histories of both the Act and the Department of Labor Regulations are reprinted in Petitioners' Appendix to the Petition for a Writ of Certiorari and which is incorporated by reference in the Joint Appendix. The page citations to the legislative history reflect the pages in the Appendix to the Petition. The Appendices references are those used in both the Appendix to the Petition and the Joint Appendix.

1. An employer may buy out accrued compensatory time for cash at any time, 29 C.F.R. §§ 553.26(a) and 553.27(a); or
2. An employee may receive cash for unused accrued compensatory time upon termination at a rate not less than the employee's average regular rate during the last three years of employment or the employee's final regular rate, 29 U.S.C. § 207(o)(4) and 29 C.F.R. §§ 553.27(b) and (c); or
3. An employee may use accrued compensatory time upon a reasonably timed request unless granting the request would "unduly disrupt" the employer's services, 29 U.S.C. § 207(o)(5); or
4. An employee or his or her representative may knowingly, willingly and absent coercion enter into a mutual agreement with the employer with regard to the "preservation, use and cashing out" of compensatory time which expressly provides for employer scheduling of accrued compensatory time off so long as the agreement is specific,[3/] agreed to prior to the work involved, 29 U.S.C. §207(o)(2)(A)(ii) and 29 C.F.R.§553.23(a)(1), is consistent with § 207(o) and its implementing regulations, and preserves employee flexibility. Pet. Br. at 37-39; DOL Opinion Letter (September 14, 1992) *available in* 1992 WL845100 (1992); and U.S. Br. at 5-6, n. 4, 12-13 and 19-21.

Otherwise, an employee's unused compensatory time bank[4/] may not be reduced. The Congress emphasized:

> Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting the obligation. H. Rep. 9-331, App. G at 68a.

An employer may not, absent an agreement, command that an employee burn off compensatory time. Here Harris County supervisors command employees to burn off accrued

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[3/] The *amicus curiae* Spokane Valley Fire Protection District No. 1 argues at 11-12 that the plain language of the FLSA indicates that compensatory time agreements will be general rather than specific and at 18-19 that if Petitioners' position were the rule compensatory time plans would be "unreasonably detailed." Nothing in the language of the Act suggests that such agreements would be general. Both the legislative history of the compensatory time provision § 207(o), S. Rep. 99-159, App. H at 73a, and the applicable regulations, 29 C.F.R. § 553.23, App. F at 46a, state that such agreements may include among other provisions, "provisions governing the preservation, use and cashing out of compensatory time so long as those provisions are consistent with section 7(o) of the Act." The agreements, therefore, may be "detailed" and not "general" to the extent they deal with this topic. At the same time, there is nothing which indicates that such agreements must be "unreasonably detailed." The agreements may be as simple and sparse or as complicated and dense as the parties want. If an issue arises that the parties did not anticipate or if circumstances change, it is relatively easy to modify any agreement, so long as the modification is freely and willingly agreed to by the parties and is consistent with the requirements of § 207(o) and its regulations.

[4/] Harris County claims that nothing in the statute nor the regulations supports the notion that employees have an "employee owned savings account of compensatory time..." Resp. Br. at 6. In fact, Congress and the Department of Labor exchanged a July 16, 1986 report on the cost impact of §207(o) which clearly referred to accumulations of accrued compensatory time as "banks." *See*, 51 Fed. Reg. 25710, App. J at 100a.

compensatory time wherever they approach a limit, below the statutory maximum of 480 hours and within the Harris County maximum of 240 hours, set by their Bureau Commander. This they may not do absent an agreement provision on the preservation, use or cashing out of the time properly authorizing employer compelled scheduling. Harris County's Brief argument to the contrary contains two fundamental errors and contains a less fundamental analytical flaw.

I. Harris County Misconstrues The Purpose Of § 207(o) And Errs In Rejecting Deference To The Department of Labor.

Harris County's Brief rests on two central faulty premises: Harris County misconstrues Congress's central purpose and intent in enacting § 207(o) and errs in rejecting deference to the Department of Labor's considered interpretation and application of § 207(o).

A. Congressional Intent. Harris County argues that their interpretation of §207(o), which would authorize employer compelled use of accrued compensatory time, must be accepted over the Secretary of Labor's interpretation, which would not allow an employer to compel compensatory time absent a knowing and willing agreement providing for it, because Harris County's rule would allow employees to save more money in the administration of FLSA overtime than would the Secretary's rule. After all, Harris County argues, the overall purpose and intent of Congress in enacting the FLSA Amendments Act of 1985 was to reduce the cost of public sector post-*Garcia* compliance with the FLSA. The argument seriously misconstrues the specific Congressional purpose and intent in enacting §207(o). It also overstates the impact of a

general cost saving purpose of the statutory scheme intended, after *Garcia*, to tailor the FLSA to the special needs of the public sector work place when the statute, the Amendments Act of 1985, expressly delegates rule making to an administrative agency.

Harris County asserts incorrectly that the central overriding purpose of the Congress in enacting § 207(o)'s compensatory time provision was to generate a budgetary savings and relieve the financial burden on public employers in paying overtime at premium rates to their employees. Resp. Br. at 5-6, 9 and 16. While it is true that the FLSA Amendments Act of 1985 sought to reduce the cost of coming into compliance of the overtime rules of the FLSA after *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), for example, by delaying for a year the date on which public employers were required to come into compliance with the FLSA, P.L.99-150, §6, 99 Stat. 787 (1985), such was not the sole purpose of the Amendments Act and certainly was not the central goal of the specific provisions on compensatory time in § 207(o). The new public sector compensatory time provisions of the Act were enacted to accommodate the existing practices of public sector compensatory time which had developed during the period in which the public sector was not covered by the FLSA. Public sector compensatory time was intended to provide "**flexibility** to state and local government employers and **an element of choice to their employees.**" *See* H. Rep. 99-331, App. G at 61a-63a. It was neither Congress's purpose nor its intent that the payment of compensatory time off in lieu of cash would result in an actual and significant savings to public employers. Yet, Harris

County would have a general Congressional cost saving goal dominate the application of §207(o) and override a specific interpretation of the Act made by the administrative agency to which the role of interpreting and enforcing the Act was assigned by Congress. P. L. 99-150 § 6 (1985).[5/]

During Congressional consideration of the 1985 Amendments Act, the Congressional Budget Office estimated the initial cost of complying with the FLSA after *Garcia* to be between $0.5 billion and $1.5 billion nationwide. The Department of Labor estimated annual cost at $1 to $3 billion. After enactment, the Department of Labor estimated that the Amendments Act of 1985 would reduce an annual $300 million cost of the *Garcia* decision by $84 million to $216 million, most of the savings being generated by a twelve month compliance grace period, and the new rules on joint employment, volunteers, and other revisions unrelated to compensatory time. 52 Fed. Reg. 2012 (July 16, 1987). The formal Methodology for Estimating the Fiscal Impact of the 1985 FLSA Amendments provided by the Department of Labor

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[5/] Harris County argues that "Absent clear direction from Congress, the Court should not impose additional administrative and financial burdens on local government. . ." Resp. Br. at 1-2. No argument is made here which urges the Court to do so. Congress enacted the compensatory requirement to replace what had previously been an absolute requirement of cash overtime with a system of compensatory time under specific pre-conditions. No employer is required to use compensatory time and every employer always remains free to take advantage of the default rule for cash overtime. 29 C.F.R. § 553.26. Congress expressly mandated that the Secretary of Labor issue implementing regulations in P.L. 99-150, § 6 (1985). This case involves only the application of the statute and the regulations, and not the imposition of new burdens. *See also* n. 8 of the *amicus* argument concerning the "plain statement" rule.

revealed clearly that the compensatory time system would not result in significant savings and that "[a]nother factor which must be taken into account is the propensity of employees to 'bank' or save their compensatory time earned. To the extent that employees 'bank' their compensatory time, there will be a delay in the cost impact of the FLSA Amendments." App. J at 97a-100a. Congress did not anticipate that the provisions on compensatory time alone would reduce greatly the cost of compliance with the FLSA overtime requirement but rather that they would generate more flexibility for employers in scheduling the increased costs and an element of choice to their employers in planning and taking the time off they earn and desire. ***See***, S. Rep. 99-159, App. H at 70a (savings achieved "by deferring the effective date") and 71a (savings by "allowing lead-time in which to record budgetary priorities, while maintaining fiscal stability").

The Congressional sponsors of the 1985 Amendments were clear that "compensatory time is not envisioned as a means to avoid overtime compensation" and its cost but "is merely an alternative method of meeting the obligation." H. Rep. 99-331, App. G at 68a. The Senate Report explained the Congressional intent in the compensatory time provisions:

> The Committee . . . is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normal scheduled workweek. These arrangements – frequently the result of collective bargaining – reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable,

we wish to accommodate such arrangements.
S. Rep. 99-159, App. H at 71a.

Congress recognized that the value of compensatory time to employees was "in being able to make *beneficial use* of the accumulated time." H.Rep. No. 99-331 App. G at 68a (Emphasis added). The Senate clearly recognized that "[r]egardless of the number of hours accrued, the employee has the right to be paid for or use accrued compensatory time subject to this subsection [the rule on compensatory time]," S. Rep. No. 99-159 App. H at 74a. Further, "[t]he employee has a right to use some or all of his accrued comp time within a reasonable period after requesting such use..." S. Rep. No. 99-331 App. H at 74a.

There is nothing in the specific legislative history of § 207(o) to suggest that the central purpose or intent of the Congress in enacting the compensatory time provision was to reduce significantly the financial impact of premium overtime compensation on public employers. Congress recognized that *Garcia*'s application of time and one half overtime standards would result in some "financial costs of coming into compliance" and postponed the effective date of the FLSA's application by a year to diminish those costs. S. Rep. 99-159, App. H at 70a-71a. However, Congress intended that the use of compensatory time in lieu of cash overtime continue as a part of the more general FLSA provision for overtime at premium (time and one half) rates knowing that this requirement would not significantly save public employers money but only increase their scheduling "flexibility" while adding "an element of choice" to the rights of their employees. H. Rep. 99-331, App. G at 62 and 62a and S. Rep. 99-159,

App. H at 71a.

There is nothing in the legislative history of § 207(o) which supports Harris County's claim that Congress intended its compensatory time provision to save public employees money such that Harris County's theory of employer mandated use of accrued compensatory time "merely gives meaning" to that Congressional intent. Neither the express language nor the clear intent of the statute resolve the issue of employer compelled use of accrued compensatory time. Congress expressly delegated such issues to the Secretary of Labor. P.L. 99-150, §6 (1985).

B. DOL Deference. Harris County errs fundamentally in rejecting deference to the Department of Labor's considered and reasonable interpretation of the compensatory time rules under the Act. Resp. Br. at 23-34. Such deference is clearly proper under *Auer v. Robbins*, 519 U.S. 452 (1997); *Moreau v. Klevenhagen*, 508 U.S. 22 (1993); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Both the Petitioners' ("Deputies'") original brief, Pet. Br. at 31-34, and the *Amicus* Brief of the Solicitor General, U.S. Amicus Br. at 10, 12, and 15, establish this.

Harris County, however, argues that the Secretary of Labor's regulations do not address the precise question presented here; Resp. Br. 7-8 and 13-14; and, that the September 14, 1992, Opinion Letter of the Wage and Hour Division, *available in* 1992 WL 8451000, in which the Wage and Hour Division responded to a specific letter from Harris County raising the question before the Court here, is not entitled to deference. Resp. Br. 30-34,

The regulations clearly provide that compensatory time

may be provided only pursuant to an agreement, and that the agreement may include provisions governing the utilization of accrued compensatory time. 29 C.F.R. §§ 553.20, 23, and 25, particularly 553.23(a)(2). The regulations provide, "The use of compensatory time must be pursuant to some form of agreement or understanding between the employer and the employee reached before the performance of the work." *See also* 29 C.F.R. § 553.50(d) (requiring that a record of the agreement must be kept). The 1992 Opinion Letter was a specific response to a request from Harris County which asked:

> While it is clear that the Sheriff must authorize an employee to use compensatory time within a reasonable period after it is requested, neither the Fair Labor Standards Act nor the regulations promulgated thereunder appear to expressly address whether the Sheriff may schedule non-exempt employees to use or take time off. Would such schedule violate the FLSA?
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> Pet. Br. at 19.

The Department of Labor responded clearly that, absent an agreement to permit such mandatory use, neither the statute nor the regulations would "permit an employer to require an employee to use accrued compensatory time." Letter Ruling WL 845100 (September 14, 1992).[6/] Both in the letter and in

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[6/] Harris County argues that the September Opinion Letter is not in the stipulated record below and, therefore, should not be considered. Resp. Br. at n. 1. The letter is a formal opinion letter of the Department of Labor's Wage and Hour Division reprinted and available through the Department of Labor's Wage and Hour Division and WestLaw. The Department of Labor maintains an indexing system to FLSA Opinion Letters of the Wage and Hour Division, interpreting the FLSA and

the brief of the Solicitor General, the Secretary has interpreted her regulations to mean that compensatory time use is at the employees' discretion absent a specific agreement in which the employee willingly and knowingly agrees otherwise. Harris County has not, and cannot, claim that this interpretation is inconsistent with the statute. Harris County claims that the Petitioner and Solicitor General's interpretation is "plainly erroneous" focuses only on the sentence in the regulations governing the scope of the agreement and ignores the sentence in the regulations requiring an agreement in the first place.[7/]

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provides copies of the letters on request. A detailed index to the DOL Opinion Letters obtained by the Bureau of National Affairs is posted on the Internet under "Special Documents" on the ABA Labor and Employment Law-BNA Books Document Library (www.bna.com/bnabooks/abana/index.html). The particular Opinion Letter in this case should not have presented a challenge to Harris County since they requested the letter and it was addressed to them. *See*, Kearns (ed.), *The Fair Labor Standards Act* (ABA Labor and Employment Law Section, BNA Books, 1999). It is a legal authority of a category regularly relied on in disputes concerning the Department of Labor's interpretation of the FLSA. The fact that the letter was the result of a specific request from Harris County in this case does not lessen its availability as authority. It does diminish any doubt concerning its applicability to these facts.

[7/] Harris County also makes an argument concerning the use of the permissive word "may," rather than the mandatory "shall," in the regulation providing that compensatory time agreements "may include other provisions governing the preservation, use and cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act." 29 C.F.R. §553.23. Harris County claims that the Solicitor seeks to turn the "may" to "shall" and to make provisions in agreements on "preservation, use and cashing out" mandatory. The point is obviously a false one. No one argues that the regulation requires every compensatory time agreement to include such provisions. Neither

The Opinion Letter and Solicitor General's brief interpret 29 C.F.R. § 553.23 in its entirety, and that interpretation is a reasonable interpretation. The interpretation is, therefore, controlling under *Auer;* further, the regulations themselves are entitled to deference under *Chevron*.

Even if the regulations were silent on the question, and the 1992 Opinion Letter and Solicitor General's brief were understood as a fully considered direct interpretation of the statute, that interpretation would be entitled to *Chevron* deference. Official agency interpretations are entitled to deference even if they are made in the course of informal adjudication rather than rulemaking. *See, e.g., NationsBank v. VALIC,* 513 U.S. 251, 256-257 (1995); *Clarke v. Securities Industries Association*, 479 U.S. 388, 403-404 (1986). In *Auer*, an interpretation expressed for the first time in an *amicus* brief to this Court, was found to be controlling.

The Department of Labor's position has been fully considered, consistent and has not wavered. Harris County's claim to find inconsistency in two earlier Opinion Letters is faulty. The 1986 Letter cited by Harris County does not address compensatory time for FLSA overtime (the issue here).

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employer nor employee is required to include anything in a compensatory time agreement. Obviously, many employers would have no desire to mandate the forced use of accrued compensatory time. Many more would find their employees unwilling to agree knowingly and freely to forced use. Those employers and their employees need not necessarily include such provisions. However, if the employer and the employees involved, in fact, willingly and knowingly agreed to special provisions in these areas they "may" include them. Again, no one argues in this case that every compensatory time agreement "must" include such provisions.

The letter instead addresses compensatory time paid for hours which are regular time under the FLSA rules but overtime under a collective bargaining agreement which is not at issue here. *See*, 29 C.F.R. § 553.28(a) ("other compensatory time"). The 1988 Letter is also not on point. It explains that employers have flexibility to structure their employees' work schedules within any single pay period; it does not address whether an employer may order an employee to work fewer hours in a subsequent pay period to offset overtime earned in a prior pay period. 29 C.F.R. § 553.231(b).

II. Harris County's Analytical Error: Storing Comp Time.

Harris County also makes significant analytical errors.[8/]

[8/] The *amicus curiae* Spokane Valley Fire Protection District No. 1 brief includes two faulty arguments concerning the application of "federal law" to the issue before the Court.

Argument # 1. The "plain statement" rule that the Court has adopted to protect States' powers under the 10th Amendment requires that all ambiguities in a statute relating to the States be construed in the States' favor. Therefore, ordinary deference principles do not apply to this case. Amicus Br. at 19-21.

Response # 1. The "plain statement" requirement applies only to the scope of a statute's coverage – that is, the question of whether Congress intends to subject that States to regulation under the 10th Amendment. *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Pennsylvania Dep't. of Corrections v. Yeskey*, 524 U.S. 206 (1998). It does not apply to the substantive provisions of a regulatory program which has clearly been held to apply to State and Local government. The Court did not invoke the "plain statement" rule in *Auer* or *Moreau,* where it applied a contrary canon that, as an exception to the FLSA's general cash overtime provision, the compensatory time provision must be narrowly construed against public employers who seek to take advantage of the exception. *Moreau*, 508 U.S. at 33. In any event, there is no ambiguity that Congress intends state and local government to be covered by the FLSA and the 1985

The most significant of which involves employee storage of compensatory time.[9/]

Harris County argues that the position of the Deputies would defeat Congress's intent because its result would be that

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Amendments Act. There is no ambiguity that Congress intended the Secretary of Labor to promulgate regulations implementing the 1985 Amendments. *See*, P.L. 99-150 § 6 (1985). Thus Congress clearly charged the Secretary of Labor with clarification of any statutory ambiguities which might arise with regard to the application or interpretation of § 207(o). *Argument #2.* The fact that in *Moreau* the Court looked at state law to construe the meaning of "representative" indicates that Congress intended the meaning of "agreement" under the FLSA to be resolved under state, not federal, law. Amicus Br. 24. *Response # 2.* The Court looked to state law in *Moreau* because it held that the Secretary of Labor's interpretation of the issue was controlling and the Secretary indicated that the meaning "representative" varied with state law. *See*, 508 U.S. at 34. The Secretary has indicated no similar reliance on state law here. To the contrary, the regulations and interpretations make clear that the meaning of "agreement" is a question of federal law settled within the Secretary's regulations and interpretations.

9/ Harris County also makes an analytical error when it argues that Deputies' position would entitle them to compensatory time "in addition to" rather than "in lieu of" cash overtime. Resp. Br. 6 and 16. This is not so. Employees receive either compensatory time or cash overtime, as provided by their agreements with the employer and in the statute. In no case would an employee receive both compensatory time and cash overtime for the same hours of work, unless it were part of a cash out exchange in which the cash was paid and the compensatory time bank diminished accordingly. When employees work for compensatory time up to the maximum and then are paid in cash for hours above the maximum, as the statute contemplates and explicitly provides, in no sense can it be said that they are receiving compensatory time "in addition to" rather than "in lieu of" cash.

employees could bank compensatory time until they reach the maximum, return at that time to cash overtime, and cash out the compensatory time at termination at higher compensation rates than when they earned the time. Resp. Br. 1-2 and 14-15. While the record contains nothing which would indicate that such is the Deputies' actual plan, if it were it would be perfectly consistent with Congressional intent.

There is no evidence whatsoever that Deputies here harbor such a plan or that Harris County has acted to take advantage of fairly simple statutory protections that would foil such a plan if one existed. There is evidence to the contrary. *First*, in the original complaint the Deputies complained not only of compelled use but also that the Sheriff's Office refused timely requests to use compensatory time when granting such requests would not "unduly disrupt" operations. While that element of the complaint was neither resolved nor carried forward on appeal, its assertion belies the Harris County claim that the Deputies harbor a plan never to use compensatory time. *Second*, while the statute sets the compensatory time maximum application to law enforcement at 480 hours; and the applicable Harris County maximum as set forth in the County Personnel Regulations 8.01 and in Respondents' Brief is 240 hours; under the stipulated facts below "each Bureau Commander determines the maximum number of hours that may be maintained by the employees in his or her bureau." Some of those limits are set at 70 hours. Harris County could work to foil the plan they describe by simply setting the maximum at a higher level making it more difficult for Deputies to return themselves to a cash overtime status. *Third*, employers have many methods of controlling the growth of

compensatory time banks.[10/] They may use 29 U.S.C. §207(k)'s extended public safety schedule replacing the 40 hour work week with a 171 hour in 28 day work period to reduce the likelihood of overtime. They may establish control over the preservation and scheduling of compensatory time through an agreement with their employees. They may assign work to employees who have not reached the overtime threshold or to employees with low compensatory accrual, or, as is the intent of the Act, they may hire additional employees to have the necessary work done without the need of overtime. Finally, as Congress suggested in enacting §207(o), and as Harris County's argument suggests may be the situation in the Harris County Sheriff's Department:

> Where public employers find that they cannot make requested time off available even outside of the periods of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but unavailable compensatory time. For those employers where the problem of disruption is persistent, compensatory time should not be the preferred method of compensation for overtime work. H. Rep. 99-331, App. G at 68a.

Fourth, the most serious problem with the Harris County's theory is that the employer may under 29 C.F.R. § 553.26 cash out any and all compensatory time at the then existing overtime

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[10/] Harris County argues at page 19 of their brief that Deputies claim "that because Congress stated that employees should be permitted to use their compensatory time request within a reasonable time employees were otherwise given **exclusive** control over the use of accrued compensatory time." Deputies make no such argument.

rate. Therefore, were any employee to attempt to "manipulate" the system so as to create a permanently standing compensatory time balance earned at a low or beginning rate of compensation hoping to increase the value of that compensatory time by waiting to cash it out at a higher termination or retirement rate, the employer could foil the scheme at any time simply by cashing out the bank at any time and taking advantage of the lower pre-retirement rate in place at the time of cash out.

More importantly, the scheme outlined is perfectly consistent with congressional intent. The fact that Congress set a statutory compensatory time maximum in 29 U.S.C. § 207(o)(3)(A) indicates that Congress anticipated that employees could bank time and would sometimes reach the maximum. Congress expressly provided that once an employee met the maximum overtime he or she must be paid in cash. *Ibid.* Congress was clear about this -- once these limits [the maximums] are reached, an employee either must be paid in cash for additional accrued hours or else must use some compensatory time before any additional overtime hours may be compensated in the form of compensatory time off. H. Rep. 99-331, App. G at 65a. Congress also expressly provided that employees would be paid their accrued compensatory time at termination or retirement and prescribed the rate at which they must be paid. 29 U.S.C. § 207(o)(4). The Department of Labor also anticipated the situation outlined by the Harris County and reported it to Congress when the Department calculated the cost impact that the implementation of § 207(o) would have on state and local government. *See* 52 Fed. Reg. 2028-2029, App. J at 96a-100a. The Department of Labor estimated based on

federal employee experience that roughly 20% of employees would save all compensatory time hours. 52 Fed. Reg. 2012 ["methodology" ¶5 (not reprinted)].

Conclusion

Section 207(o)(5)'s rule on use of compensatory time shows that when Congress intended that an employer exercise control over an employee's use of compensatory time, Congress expressly so provided. This is especially important in the application of a statutory rule which is an exception to the general rule that all overtime must be paid in cash. Congress clearly did not provide that an employer can force an employee to burn off compensatory time when the employee does not wish to do so. Such a right if it existed would, as clearly as payment in script diminishes the value of wages, diminish the value of accrued compensatory time. It is highly unlikely that Congress would explain expressly that accrued time could be cashed out by the employer, 29 C.F.R. § 553.26, or used by the employee on timely request, 29 C.F.R. § 553.23, and yet approve such a diminishment in the value of compensatory time only by silence.

For all of these reasons and for the reasons set forth in Petitioner's Brief and the *Amicus* Brief of the United States, this Court should overturn the Court below and remand this case for a decision consistent with the Department of Labor's interpretation of 29 U.S.C. § 207(o) that a public agency may not, absent a pre-existing agreement, compel employees to use accrued compensatory time.

Respectfully Submitted,

MICHAEL T. LEIBIG*
General Counsel, International Union of
Police Associations, AFL-CIO
KIMBERLY SIMON
Zwerdling, Paul, Leibig, Kahn,
Thompson & Wolly, P.C.
4012 Williamsburg Court
Fairfax, Virginia 22032
(703) 934-2675

RICHARD H. COBB
Co-Counsel
811 North Loop West
Houston, Texas 77008

MURRAY E. MALAKOFF
Co-Counsel
Alvarez & Notzon, LLP
5219 McPherson, Suite 380
Laredo, Texas 78041

Counsel for Petitioners

*Counsel of Record